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No. 549

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

WALLY KELBERINE and LENKA BERLIN, et al.,
Petitioners,

v.

SOCIETE INTERNATIONALE POUR DES PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A. (INTERHANDEL), a corporation organized under the Laws of Switzerland,
Respondent,

and

NICHOLAS KATZENBACH, Attorney General of the United States, and
DOUGLAS DILLON, Secretary of the Treasury of the United States,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

HAROLD E. STASSEN
ROGER A. JOHNSEN
1020 Fidelity-Philadelphia Trust Building
Philadelphia 9, Pennsylvania
Attorneys for Petitioner

ALVIN DIAMOND
JOHN A. CROGHAN
CHARLES B. E. FREEMAN
824 Federal Bar Building
Washington, D.C.
Of Counsel

September, 1966

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 7, 1966. Petitions for Rehearing, filed by petitioners and respondent Interhandel were denied on June 16, 1966.

OPINIONS BELOW

No Opinion was filed by the District Court.

The Opinion of the Court of Appeals, printed in Appendix A hereto *infra*, p. 1a is reported at App. D.C. , F2d .

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1966. Petitions for Rehearing, filed by petitioners and respondent Interhandel were denied on June 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the defense of sovereign immunity to suit is available to respondents Attorney General and Secretary of the Treasury when the Congressional authorization provides for holding the funds in question in trust, "pending the entry of final judgment in such suit" when final judgment has not been entered in such suit, and when Plaintiffs request the Court in Equity to redirect final payment to a trustee for the benefit of the slave labor victims of Defendant Interhandel through its master I. G. Farben, such victims being now citizens of the United States and presenting a Petition for Relief which in no manner and in no degree is adverse to the interests of the United States Government and where petitioners have a personal stake in the funds sought to be distributed.

2. Whether as a prime principle of United States Constitutional Law and of private international law, available to citizens of the United States under the Constitution, if in an area of the world human beings, through private acts which are not acts of state, are illegally forced into slave labor, their properties illegally taken from them, members of their families upon whom they are dependent for suport and care are unlawfully killed, under circum-

stances in which they are then powerless to resist and then unable to obtain redress, can these victimized human beings, upon subsequently becoming citizens of the United States and upon subsequently finding the private wrongdoers and some of their private property within the jurisdiction of the Court of the United States, bring an action for redress for their wrongs against the private wrongdoers and to the extent that they can prove their individual losses, recover pro rata and equitably to the extent of the property of the private wrongdoer available within the jurisdiction of the Court; and further whether the administration of a fund of $60,000,000 under the Court appointed trustee and the receiving of claims of United States citizens who were victims of the wrongdoings of Defendant Interhandel through its master I. G. Farben (such claimants probably numbering as many as 200,000) is too complex and difficult and beyond the powers of the Court and can only be effected through Congressional action, or whether such process of redress is within the inherent and feasible procedures of the Court.

3. Whether the petitioners were deprived of due process under the Fifth Amendment to the United States Constitution by the refusal of the District Court to grant a continuance for the purpose of taking depositions to develop the facts which would show that the actions of payment without final judgment of court, to Interhandel by respondents Katzenbach and Fowler would be beyond their statutory authority and thus subject to the jurisdiction of the Court and not within the sovereign immunity rule.

STATUTE INVOLVED

This case involves the application of Section 9 (a) of the Trading with the Enemy Act, as amended, Pub. L. No. 87-846 § 203, 76 Stat. 1113 (1962) and Amendment V of the Constitution of the United States. They are printed in Appendix B, *infra* p.12a.

STATEMENT

Petitioners in this class action are citizens of the United States and are surviving victims of certain slave labor camps that were constructed, organized and operated by respondent Interhandel, through its master I. G. Farben, during the Second World War. Citizens of Germany and other European countries at that time, the petitioners lost their property to the respondent Interhandel. This is a suit for damages suffered by petitioners at the hands of respondent Interhandel during that period.

On March 9, 1965 the United States Government sold, and on March 17, 1966 delivered, the shares of General Aniline and Film, which it had seized as Enemy Alien Property during World War II and which constituted the principal asset of the respondent Interhandel. Respondent Interhandel's share of the proceeds of the sale were then deposited in an account in the Department of the Treasury. Originally totaling $120,000,000, the funds on deposit now total approximately $60,000,000, the remainder having been released to respondent Interhandel.

On March 16, 1965 petitioners brought this action in the District of Columbia because of respondent Interhandel's business activities in Washington. The theory of the suit is that respondent Interhandel is a tort feasor which inflicted grievous bodily harm upon the petitioners, converted their property and forced them to perform labor as slaves without just compensation.

As an incident to this suit, petitioners requested that the Attorney General and the Secretary of the Treasury not release the funds from the Attorney General's account to the account in the United States Treasury bearing the name of the respondent Interhandel, and that a master or masters be appointed to determine the validity and extent of the claims of petitioners and the members of their class and to make adjudications.

Respondents Attorney General and Secretary of the Treasury moved for dismissal of the Complaint as it related to them contending that this action was in reality

a suit against the United States to which it had not given its consent. The District Court (Jones, J.) granted the motion on April 9, 1965.

The Court of Appeals, in the opinion set out in Appendix A, affirmed the District Court on this point (Prettyman and Miller, Senior Circuit Judges, and Danaher, Circuit Judge).

Respondent Interhandel moved to "quash return of service and/or to dismiss the complaint" on the grounds that respondent Interhandel was not in fact doing business within the District of Columbia and therefore was not subject to service. After extensive depositions, Judge Jones of the District Court granted respondent Interhandel's motion, without Opinion, on April 29, 1965.

The Court of Appeals in its Opinion filed on April 7, 1966 reversed this holding and found that respondent Interhandel was in fact doing business in the District of Columbia and was amenable to service. However, the Court of Appeals found this suit unusual and—without brief or argument on the point—held that to permit these Plaintiffs to recover against respondent Interhandel for wrongs suffered by them would compel the judiciary to enter an area which it should avoid without legislative guidance. The Court of Appeals therefore concluded that the Complaint did not state a cause of action upon which relief could be granted and affirmed the dismissal of the Complaint by the District Court.

Both the petitioners and respondent Interhandel filed timely Petitions for Rehearing and respondent Interhandel also requested a rehearing *en banc*. All of the Petitions were denied on June 16, 1966.

REASONS FOR GRANTING THE WRIT

This case concerns the rights of U.S. citizens who were slave labor victims of respondent Interhandel to recover partial compensation from one of the principal private organizers of—and private profiters from—the Nazi persecutions of the 1930s and the 1940s. Interrelated are

questions involving the development of a World Law and the recognition of the right of victims of aggressive war and private wrongdoers during wartime to receive compensation out of the private assets of the wrongdoer located in the country of which the victims are now citizens.

1. In holding that the Complaint, by victims whose human rights were violated by private wrongdoers, seeking compensation from their assets now located in Washington, D.C. does not state a cause of action upon which relief may be granted, the Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this court.

The theory behind this case is a simple one. The wrongs inflicted upon petitioners in Europe by respondent Interhandel were transitory actions for which compensation may be sought before any Court which has jurisdiction over the parties. Petitioners seek to apply this principle, which is invoked daily before our Courts on tort and contract questions, to secure recovery for their infinitely greater sufferings out of the fund of $120,000,000 created by the sale of the stock of General Aniline and Film Company, the principal asset of the respondent Interhandel. The recognition of this right by the Courts of the United States would constitute a significant first step toward the establishment of an International Rule of Law for the compensation of wrongs suffered at the hands of private wrongdoers by innocent victims of aggressive war, and of private personal enslavement, persecution, and illegal deprivation of property, the wrongdoings not being Acts of State.

The tools necessary for the adjudication of this suit, and the determination of the claims arising thereunder, are provided in our laws. It is unnecessary to seek further legislative guidance as the Court of Appeals suggested. Had either the Court or respondents raised any questions previously as to the need for legislative guidance, petitioners would have demonstrated how these determinations

can be made within our existing legal framework. Should this Petition be granted, petitioners will outline in their briefs the procedures which they will recommend be adopted to determine the rights of the respective petitioners, and of future additional claimants.

2. The Court of Appeals has decided a Federal question in a way in conflict with applicable decisions of this Court in holding that petitioners have no standing to enjoin the unauthorized payments to respondent Interhandel.

Petitioners seek to enjoin the payment of the proceeds of the sale of the General Aniline and Film stock to respondent Interhandel. Petitioners have consistently limited their claim to only that portion of the fund remaining after provision had been made for the claims and indemnities of the United States, arising under the Settlement Agreement. The interest of the petitioners is, of course, that it represents assets out of which the claims will be paid. Injunctive relief was sought principally on the basis that the proposed payment to respondent Interhandel was directly contrary to the express language contained in the statute especially enacted to deal with the disposition of the Interhandel assets.* The Court of Ap-

* The Statute provides for the sale of assets held by the Alien Property Custodian upon determination by the President that such sale would be in the interest of the United States. The Statute later provides that "(t)he net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit." The trial judge in the main case, *Societé Internationale v. McGrath*, Civil Action No. 4360-48, refused to sign the order for Entry of Judgment when it was presented to him. The parties then simply amended their "Settlement Agreement" to call for the funds to pass upon the filing of a praecipe for dismissal, which of course required no judicial approval. Petitioners contend that under the law and these facts, the actions of the Attorney General and the Secretary of the Treasury were *ultra vires* and not entitled to the protection of the sovereign immunity.

peals held that petitioners did not have standing to sue to enjoin the payment, citing *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923).

If left undisturbed, this extension of the *Massachusetts* v. *Mellon* doctrine would deprive petitioners of what they would have had, had the special Internhandel legislation been followed. This requirement that the final entry of judgment be made by the trial judge would have provided these petitioners with the opportunity of coming forward to present their claims. This route was denied them and they have a very special interest in seeing that the procedure spelled out in the Statute be followed.

The distinction between the facts of the present case and those in *Massachusetts* v. *Mellon* is apparent. In the later case, Plaintiff sought to prevent the payment of Federal funds to the States which met certain requirements for welfare programs. It was a taxpayer's suit to test the Constitutionality of the law under which payments were to be made. Mrs. Frothingham's interest was that of a taxpayer and nothing more.

The interests of petitioners in the instant case are much greater. They appear not as citizens seeking to compel government officials to administer according to the law; they have a direct interest in that fund and they look to it for payment of their compensation claims. They have a very real interest that it not be permitted to leave the jurisdiction of the Courts of the United States and be transmitted to Switzerland before their interests are determined—and their interest is all the more real and immediate when one remembers that those who propose to transmit the funds plan to do so without following the procedural safeguards the Congress imposed.

It was urged below, and is implicit in the Opinion of the Court of Appeals, that petitioners must show some sort of a vested interest or equitable lien in the fund in order to have standing to sue. It is respectfully submitted

that this is not the law as enunciated by this Court and that to allow the holding of the Court of Appeals to remain will impose an unnecessary and unwarranted burden upon these and other litigants. While it is true that most of the cases where injunctive relief was sought against a Federal officer to compel him to take, or refrain from, certain actions in regard to property involved property in which the Plaintiffs had legal or equitable interests, the cases do not hold it to be necessary for Plaintiffs to show such an interest. The fact that such interests may be present in most cases should not bar other claims where the interests may not be present in the same form.

The search for legal or equitable interests in the property—which never was a requirement—has little place in modern practice since this Court enunciated the "personal stake" test in *Baker* v. *Carr*, 369 U. S. 186 (1962).

In one of its most recent pronouncements on the subject of standing to sue, this Court has expressed the law in these words:

> "Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing."
>
> *Baker* v. *Carr*, 369 U. S. 186 (1962).

More recently, in *Abington School District* v. *Schempp*, 374 U. S. 203, 267 (1963), the concept of standing was described as "a necessarily flexible one", citing *Baker* v. *Carr, supra.* (Separate Concurring Opinion of Mr. Justice Douglas.)

It is this necessarily flexible concept which is the appropriate test in this case and it was error for the Court of Appeals to require a showing of an equitable lien.

3. The refusal of the District Court to grant petitioners' motion for continuance for the purpose of taking depositions to establish the facts surrounding respondents Attorney General and Secretary of the Treasury's asserted defense of sovereign immunity constituted denial of due process under the Fifth Amendment to the Constitution of the United States.

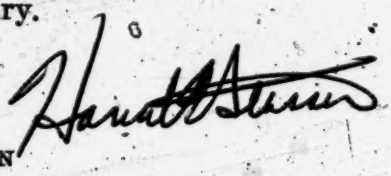
This suit was filed on March 16, 1965 and on March 24 service was made upon the government officers. On April 9, while the petitioners were taking the deposition of Anthony L. Mondello, Deputy Director, Office of Alien Property, Civil Division, Department of Justice, the District Court denied petitioners' motion for a continuance to complete depositions on the question of sovereign immunity and dismissed the Complaint as it related to respondents Attorney General and Secretary of the Treasury.

The proceedings in the District Court on April 9, 1965 (Joint Appendix, pp. 94-102) reveal clearly that the Court viewed the interrelated questions of standing and sovereign immunity as questions of law and foreclosed all attempts to develop the facts on these points through depositions. Full development of the facts is important in determining whether the respondent government officials were in fact exceeding their legislative authority. In a similar fashion, the flexible concept of standing requires that petitioners be given fair opportunity to develop the facts that give meaning to the concept. Neither of these questions can be decided in a factual vacuum. And a factual vacuum is all that can result when not a single continuance for depositions on these points was granted.

CONCLUSION

Wherefore, petitioners pray that a writ of certiorari issue from this honorable Court to review the judgment of the Court of Appeals for the District of Columbia Circuit in Wally Kelberine and Lenka Berlin *et al. v.* Interhandel and Nicholas Katzenbach, Attorney General, and Douglas Dillon, Secretary of the Treasury.

Respectfully submitted,



HAROLD E. STASSEN
ROGER A. JOHNSEN
1020 Fidelity-Philadelphia Trust Building
Philadelphia, Pa.

ALVIN DIAMOND
JOHN A. CROGHAN
CHARLES B. E. FREEMAN
824 Federal Bar Building
Washington, D.C.
Of Counsel

September, 1966.

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19286

WALLY KELBERINE, et al., APPELLANTS

v.

SOCIETE INTERNATIONALE, Etc., INTERHANDEL, Etc., et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided April 7, 1966

Mr. Harold E. Stassen, of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of court, with whom *Mr. John Alvin Croghan* was on the brief, for appellants.

Mr. John J. Wilson, with whom *Mr. Frank H. Strickler* was on the brief, for appellee Societe Internationale, Etc.

Mr. Richard S. Salzman, Attorney, Department of Justice, with whom *Mr. David C. Acheson,* United States

Attorney at the time the brief was filed, and *Mr. Morton Hollander,* Attorney, Department of Justice, were on the brief, for appellees Katzenbach and Fowler. *Mr. Fred W. Drogula,* Attorney, Department of Justice, also entered an appearance for appellees Katzenbach and Fowler.

Before PRETTYMAN and WILBUR K. MILLER, *Senior Circuit Judges,* and DANAHER, *Circuit Judge.*

PRETTYMAN, *Senior Circuit Judge:* This law suit has an antecedent history. In years prior to World War II the appelleee Societe Internationale, Etc.,[1] a Swiss holding corporation, came into ownership of various American properties, including over 90 per cent of the stock of General Aniline and Film Corporation, a Delaware corporation. In 1942 this stock was vested in the Alien Property Custodian, succeeded by the Attorney General of the United States, under the Trading With the Enemy Act.[2] When the war was over, Interhandel in 1948 sued under Section 9(a) of the Act to recover the property. The litigation was extensive.[3] Finally in 1963 the case was settled by an agreement written and filed in the suit.[4] Pursuant to that stipulation the General Aniline stock was sold at public auction, some three hundred twenty-nine million dollars being realized from the sale. The bids were opened March 9, 1965, and the shares delivered March 17, 1965. Interhandel's share of the proceeds was

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[1] Known to this litigation variously as I. G. Chemie and as Interhandel.

[2] 40 STAT. 411 (1917), as amended, 50 U.S.C App. § 1, *et seq.*

[3] See Societe Internationale v. Rogers, 357 U.S. 197 (1958), *reversing* Societe Internationale, Etc. v. Brownell, 100 U.S. App. D.C. 148, 243 F.2d 254 (1957); Societe Internationale, Etc. v. McGranery, 111 F.Supp. 435 (D.D.C. 1953), *aff'd sub nom.* Societe Internationale, Etc. v. Brownell, 96 U.S. App. D.C. 232, 225 F.2d 532 (1955), *cert. denied,* 350 U.S. 937 (1956).

[4] Civil No. 4360 (D.D.C. 1948).

one hundred twenty million dollars. This share was deposited in a special account in the Treasury and is being held there, delivery to Interhandel having been delayed by the terms of the settlement and by this law suit.

Our appellants, Wally Kelberine and Lenka Berlin, two individuals, filed this civil action on March 16, 1965, the day before the delivery of the Aniline stock pursuant to the sale at auction. In their complaint they say they suffered under the Nazi conspiracy in Europe and that they are now, although they were not at the time of their loss and damage, citizens of the United States. They say they bring the action on behalf of all persons similarly situated, too numerous to bring before the court. They say the Attorney General and the Secretary of the Treasury intend to deliver to Interhandel the $120,000,000 proceeds from the sale. They further say that between 1933 and 1945 a number of men and corporations in Europe acted in a gigantic conspirary (referred to as the "Nazi Conspiracy") in the course of which they illegally seized the property of plaintiffs and of the class they represent, and that they (meaning the conspirators) enforced slave labor upon plaintiffs and killed members of the families of plaintiffs. They further allege that I. G. Farbenindustrie, a corporation, was an integral part of the Nazi conspiracy, participated in it, and profited from it, and has been declared officially by the United States Government to have been an integral part of that conspiracy. They say that Interhandel was a creature of Farbenindustrie and that it is and should be fully accountable and liable to the extent of the assets within the United States and to the extent of the losses and damages of the plaintiffs at the hands of the Nazi conspiracy. Plaintiffs say that the seizures, etc., were illegal under the valid laws of the states concerned and that the claims of plaintiffs rest further upon inherent natural law. They

say the class they represent exceeds two hundred thousand persons.

Plaintiffs pray that the Attorney General and the Secretary be enjoined from paying to Interhandel any part of the $120,000,000, that plaintiffs as a class be adjudicated as having "the right to said $123,000,000 in funds", and "That upon the individual proof of claim by the Plaintiffs to a master or masters appointed by this Court, the Plaintiffs individually pro rata and equitably be paid said funds upon their adjudicated claims."

The Government defendants moved to dismiss on the grounds that, as to them, the court lacked jurisdiction and that the complaint failed to state a claim upon which relief could be granted. Defendant Interhandel moved to dismiss "and/or" to quash the summons on the grounds that it was not subject to process in the District and that it had not been properly served. Plaintiffs proceeded to take depositions in pursuit of discovery. The motions were set for hearing April 9, 1965. Plaintiffs moved to continue them generally. The court granted the Government defendants' motion to dismiss and continued Interhandel's motion, setting it for hearing on April 29th. Plaintiffs took further depositions and moved to continue the hearing on the motion to a still later date to permit them to explore further certain phases of discovery. The court denied the motion to continue and granted Interhandel's motion to dismiss and to quash service of process. This appeal followed.

I

Did the District Court err in refusing to continue consideration of the motions to dismiss pending the further taking of depositions by plaintiffs? The subject of the depositions, so far as is indicated, was the doing of business by Interhandel in the District of Columbia. Plaintiff had one continuance of twenty days and had taken

several depositions directed to this subject. Interhandel claimed the subject had been covered exhaustively. The court sought a proffer from counsel for plaintiffs, pointing out that plaintiffs said the only business of Interhandel was fronting for Farben and owning the stock of General Aniline. Upon that basis the court thought the evidence already taken was enough. Plaintiffs said that by taking the further depositions they would have "a more comprehensive and complete view". We think the court was correct, and in any event the matter was primarily in its discretion.

II

Did the court err when it quashed the service? We think it did. The District of Columbia statute[5] provides that the District Court here shall have cognizance "of all cases in law and equity between parties, both or either of which shall be resident or be found within said district". Interhandel came into the District to file a civil action concerning its property. It continued to prosecute that action. It appointed and maintained here an attorney in fact, who was authorized to accept service of all notices and process on its behalf for such proceedings between it and the Attorney General and "Treasurer of the United States" as may be necessary to the enforcement of the stipulation of settlement of the pending civil action and of any judgment entered in that action; and for no other purpose whatever. We think the institution and prosecution of a civil action in the court here clearly establishes the presence of the corporation here. It voluntarily subjected itself to the jurisdiction of the court; it could not do so *in absentia*. So we think Interhandel was clearly found here.[6]

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[5] D.C. CODE § 11-306 (1961 ed.).

[6] The "found" feature of this statute was discussed briefly by the Supreme Court in Graham v. Brotherhood of Firemen, 338 U.S. 232, 236 (1949).

Interhandel says appellants' contentions on this point fail because it has never transacted business here. It says Congress defined "doing business" when it exempted from license requirements corporations which merely prosecute litigation.[7] The statute does not read as Interhandel reads it. It exempts these corporations from the necessity of getting a license, but it notably does not say they are not doing business. Furthermore the liability of a foreign corporation to suit here does not depend upon its doing business here; it depends upon its being found here.

The corporation being found here and therefore subject to suit here, the next question concerns service of process: Upon whom could service be had? We think service upon the agent resident in the District was valid. His expressed authority was limited, to be sure. But it covered the law suit respecting the Interhandel property; he was empowered to accept service "for such proceedings between the parties to this Stipulation as may be necessary to the interpretation or enforcement, or both, of this Stipulation". The case at bar certainly involved the enforcement of the stipulation; indeed it sought to prevent that enforcement. It is true that proceeding was not between the parties to the stipulation, but all of those parties were parties to this suit. It could quite properly be held that process in this case fell within the agent's express authority. But we do not rest upon that power of attorney. We think that under the total circumstances of the case the agent of the corporation present in the District for the purpose of conducting the litigation in the courts here was subject to process in this suit. The statute says[8] that service may be made on a non-resident corporation by service

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[7] D.C. CODE § 29-933(b) (1961 ed.).

[8] D.C. CODE § 29-933i(a) (1961 ed.).

thereof on "the registered agent", but it also provides[9] that nothing therein shall limit the right to serve process "in any other manner now or hereafter permitted by law." We are of opinion that, a foreign corporation being present in the District, its agent duly authorized to do the tasks for which it is present here may be served with process in its behalf in an action reasonably within the ambit of those tasks.[10]

We intend this ruling to be no broader than the case. We hold that, if a foreign corporation comes into the District of Columbia for the purpose of filing and prosecuting in the District Court a suit concerning certain property, it cannot, by restricting the authority of its resident agent, immunize itself against suit in that same court involving that same property.

It is suggested that since, as appears in a moment, we affirm the dismissal of the complaint, the dispute concerning the service of process is moot and ought not to be decided. But, on the other hand, if Interhandel was not susceptible to process in the District, the nature of the complaint, valid *vel non*, was immaterial. Thus we think decision upon the service-of-process point is an integral first step in the resolution of the controversy. Had we decided Interhandel was not subject to suit, there would have been an end to the matter. But, since we hold Interhandel to have been subject to suit and correctly served, we pass on to the problem of the dismissal of the complaint.

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[9] *Id.*, § 29-933i(c).

[10] See the discussions by the Supreme Court in Hansom v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Mining Co., 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

III

Did the court err in dismissing the action against the Government officers? We think it did not.

Pending in the court here was a civil action by Interhandel against the Attorney General concerning properties vested in him by virtue of a federal statute. The President, by a memorandum dated January 8, 1963, and under authority vested in him by statute,[11] determined that the interest of the United States required the sale of this property. The Attorney General had power to settle the litigation.[12] He settled it. One of the terms of the stipulation of settlement was that the funds would be held by the United States as security for the performance by Interhandel of certain indemnity obligations imposed upon it by the agreement. (Sec. VIII(4).) Those obligations (Sec. IX(2)) were that Interhandel would hold harmless the United States and its officers and employees from any claim made relating to actions described in certain paragraphs of the stipulation, or resulting from compliance by any officer of the United States with the stipulation, and from any claim made relating to the control or operation of the General Aniline and Film Corporation by Interhandel, or any of its stockholders, or persons under its control, or successors to such persons. Further, Interhandel agreed (Sec. IX(2)) to indemnify the United States and its officers and employees from any claims brought by the Government of the Netherlands on behalf of itself or its political subdivisions, Interhandel or persons under its control, or any Dutch national person, in respect to the properties subject to the stipula-

[11] Pub. L. No. 87-846, § 203, 76 STAT. 1113 (1962).

[12] Halbach v. Bumsted, 207 F.2d 503 (3d Cir. 1953), *cert. denied sub nom.* Bumsted v. Markham, 347 U.S. 933 (1954); Standard Oil Oil Co. v. Clark, 163 F.2d 917 (2d Cir. 1947), *cert. denied*, 333 U.S. 873 (1948); Castell v. United States, 98 F.2d 88 (2d Cir.), *cert. denied*, 305 U.S. 652 (1938).

tion. The stipulation provided that the United States could recover sums due by reason of the indemnities either by payment or by cancellation of the securities in which the properties were invested. And it provided (Sec. VIII(4)) that redemptions of these properties for Interhandel could be made from time to time as the Attorney General determines that such securities are no longer needed to secure the performance by Interhandel of its indemnity obligations. Thus it is amply clear that the United States has an interest in these securities and that its officers are performing official duties involving judgment and discretion, not mere ministerial chores. The action was to require these officers to turn over to plaintiffs these securities and also to prevent them from carrying out the obligations of the stipulation of settlement. Thus the action is against the United States, which has not consented to it. It was correctly dismissed.

Plaintiffs cite and rely upon *Mellon* v. *Orinoco Iron Co.*[13] and *Houston* v. *Ormes.*[14] None of the criteria listed in those cases as premises for exceptions to the general rule respecting unconsented-to suits against the United States are present in the case at bar.[15]

Moreover (although the point is immaterial in view of the foregoing) plaintiffs specifically and expressly asserted to the trial court that they claim no equitable lien upon the funds being held in the Interhandel account. Thus they are in the position of persons merely interested in the common good and, under the doctrine of *Massachusetts* v. *Mellon,*[16] have no standing to sue.

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[13] 266 U.S. 113 (1924).

[14] 252 U.S. 469 (1920).

[15] And see Smith v. Harrah, 60 App. D.C. 258, 51 F.2d 314 (1931), and McCormack v. Harrah (a companion case), 60 App. D.C. 260, 51 F.2d 316 (1931).

[16] 262 U.S. 447 (1923).

IV

Did the court err when it dismissed the complaint? We think it did not.

The thesis of the action is easily recognized from the outline we have given of the complaint. Interhandel is a creature of Farben. Farben was a part of the Nazi conspiracy of 1933-45. The Nazi conspiracy, in violation of the laws of the several states involved and of natural law, damaged these two plaintiffs and others, to a number of some two hundred thousand, destroying their property, killing their relatives, and reducing them to slave labor. Therefore all the property of Interhandel should be awarded by American courts to these plaintiffs, pro rata. We are of opinion the thesis is not presently susceptible of judicial implementation. It may be that the Congress might enact a program and a procedure by which the objectives prayed for could be achieved. But we think the courts alone cannot do it. As presently framed, the problem is not within the established scope of judicial authority. It did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United States. The premises for these conclusions are many and easily seen. The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tort feasors is too indefinite. The procedure sought—adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power—is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

The complaint prays, as we have noted, that all the Interhandel funds be divided "pro rata and equitably" among the participating petitioners. If only the present two participate, they would receive sixty million dollars apiece. If

the entire potential two hundred thousand damaged persons entered the proceeding, each would receive six hundred dollars. This method of award would be a novelty to us. The events, the witnesses, the guilty tort feasors, their membership in the conspiracy are all so potentially vague at this point as to pose an insoluble problem if undertaken by the courts without legislative or executive guidance, authorization or support. The whole concept is too uncertain of legal validity to sustain the self-establishment of the proceedings by a court in the absence of specific legislative or executive formulation. It seems to us that the trial court correctly dismissed the action for failure to state a claim upon which relief can be granted.

Affirmed.

APPENDIX B

U. S. Constitution, Amendment V

"No person . . . shall be deprived of . . . property, without due process of law; . . ."

Trading With The Enemy Act, Sec. 9(a)

". . . *Provided further,* That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead . . ."

Pub. L. 87-846, Title II, §203, 76 Stat. 1113, 50 App. U.S.C., § 9(a).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 549

WALLY KELBERINE and LENKA BERLIN, ET AL.,
Petitioners

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A. (INTERHANDEL), a corporation organized under the laws of Switzerland, *Respondent*

and

NICHOLAS KATZENBACH, Attorney General of the United States, and

DOUGLAS DILLON, Secretary of the Treasury of the United States, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT SOCIETE INTERNATIONALE, ETC.,[1] IN OPPOSITION

QUESTION PRESENTED

The second question presented by Petitioners relates to this Respondent.[2] In this Respondent's opinion,

[1] This Respondent is frequently referred to as Interhandel, and may be so referred to herein.

[2] Questions 1 and 3 relate to the other Respondents who will doubtless discuss them, and this Respondent (Interhandel) will, therefore, abstain from commenting upon such questions.

the question is incorrectly phrased, and, based upon the record, should be stated as follows:

> Whether two victims of Nazi conspiratorial oppression during the years 1933-1945 can maintain a class tort action in an American federal court, filed in 1965 against a Swiss corporation defendant (Respondent Interhandel) as a tort-feasor alleged to be the creature of I.G. Farben, a member of the conspiracy, and sequester the Swiss corporation's funds obtained in a settlement with the United States Government under Section 9(a) of the Trading with the Enemy Act, where no equitable lien or other recognized right to specific property is involved, and where the Swiss corporation is sued merely as the creature of the alleged Nazi "master", and no misconduct is alleged against such defendant.

COUNTERSTATEMENT OF THE CASE

Since motions to dismiss were filed by all defendants in the District Court, the complaint has not been answered, and the averments of fact in the complaint will be accepted by this Respondent for the purposes of this Counterstatement, although many of the averments would be disputed in an answer. A fair summarization of the complaint[3] and of the district court proceedings was done by the Court of Appeals in the introductory paragraphs of its opinion, and in order to avoid repetition, this Court is respectfully referred to that summary.[4]

The complaint goes no further, insofar as Interhandel is concerned, than to allege that Interhandel "was a creature of I.G. Farbenindustrie A.G.". This

[3] The complaint is printed in Appendix A to this brief.

[4] The entire opinion is printed in Appendix B to this brief.

phrase is mentioned twice in the complaint, once in paragraph VIII (App. A, p. 3a) and again in paragraph XII (App. A, p. 5a). The Court of Appeals adopted the phrase in two instances in its opinion (App. B, pp. 10a and 16a). However, the petition for certiorari, in a number of instances, goes far beyond the mere "creature" averments of the complaint to exaggerate and expand the status of Interhandel.

The chief purpose of this counterstatement is to correct these gross misstatements by Petitioners in their petition, repeated several times. In the first question presented (Pet. p. 2) Petitioners are described "as victims of Defendant Interhandel *through its master* I. G. Farben" (Italics supplied). It will be seen from the complaint, and from the Court of Appeals' paraphrase of it, that Interhandel is not charged with any misconduct on its own part. It is merely that the sins of the "master" are visited upon its alleged offspring (creation).

The phrase in the second question (Pet. p. 3) is slightly changed to describe the Petitioners as the "victims of the *wrongdoings* of Defendant Interhandel *through its master* I. G. Farben (Italics supplied). The STATEMENT on page 4 of the petition opens with the same "through-its-master" phrase, but suddenly this concept is permanently abandoned, and the following distorted expressions are encountered on the same page:

> "* * * petitioners lost their property to the respondent Interhandel."
>
> "This is a suit for damages suffered by petitioners at the hands of respondent Interhandel * * *."
>
> "* * * The thory of the suit is that respondent Interhandel is a tort feasor which inflicted grievous

bodily harm upon the petitioners, converted their property and forced them to perform labor as slaves without just compensation."

Clearly, Interhandel, itself, is not charged in the complaint with any misconduct (App. A) If "master" means "creator", petitioners are suing Interhandel merely as the "creature" of Farben. If "master" is used in the "master-servant" concept, the servant is being sued for the alleged misconduct of the master. The property sought to be sequestered is not claimed to have been the product of "slave labor camps" or other atrocities; or, stated conversely, Petitioners make no claim that any losses sustained by them were converted into the vested property. They admit that the General Aniline shares belonged to Interhandel, and, more particularly, that the funds in the Treasury to the credit of Interhandel are Interhandel's property (Pet. pp. 4, 6). They concede the non-existence of an equitable lien. (See Court of Appeals opinion, App. B p. 16a). Their "personal sake" claim, citing *Baker* v. *Carr,* 369 U.S. 186, 7 L. Ed. 2d 663 (1962), is clearly inapplicable to the case at bar, and will doubtless be fully answered by the other Respondents as part of their opposition.

ARGUMENT

The opinion of the Court of Appeals is divided into four sections, marked by Roman numerals. Petitioners complain about sections III and IV. Section I is immaterial to the instant petition, and section II, relating to service of process upon Interhandel in the District of Columbia, is adverse to Interhandel, and is the subject of its pending petition for a writ of certiorari in case No. 539, October Term, 1966.

Section III of the opinion and paragraphs 2 (Pet. p. 7) and 3 (Pet. p. 10) of the REASONS FOR GRANTING THE WRIT, relate to the other Respondents, and Interhandel will abstain from discussing the subject matter thereof, other than to state that, in this Respondent's view, the lower court was clearly right and Petitioners are clearly wrong.

This Respondent (Interhandel) is concerned in this brief only with Section IV of the lower court's opinion and paragraph 1 (Pet. pp. 6-7), and the introductory paragraph which precedes it (Pet. pp. 5-6), of the REASONS FOR GRANTING THE WRIT chapter of the petition.

This Respondent pauses to point out the repetitious distortions again appearing on pages 5-6 of the petition, of the kind that have been called to the Court's attention in the foregoing Counterstatement. In the introductory paragraph (Pet. p. 5), the erroneous charge of "slave labor victims of respondent Interhandel" is repeated, followed by an anonymous reference to Farben, but in a context where the reader might think that the culprit is supposed to be Interhandel. Again, on page 6 of the petition, it is stated that the "wrongs" were "inflicted upon petitioners in Europe by respondent Interhandel." This has no support in the record unless it is so stated upon the basis of *reverse* vicariousness—creature liable for misconduct of creator; servant liable for acts of master—which, without more, is highly novel, unorthodox, and, indeed, unknown to the law of civilized countries.

Petitioners make no argument to support their attack upon the lower court's dismissal of their complaint on the ground that it does not constitute a justiciable

cause of action (Section IV of the opinion, App. B, p. 16a). They offer no precedent, judicial or otherwise, for what they wish to do. They seek certiorari for this Court to bring about "the development of a World Law" and "an International Rule of Law" as predicates for their recovery (Pet. p. 6). They call the question an important one of federal law (Pet. p. 6) when, of course, it is not.

No better reply can be made to Petitioners than the language of the Court of Appeals (App. B. p. 17a):

> "* * * the problem is not within the established scope of judicial authority. It did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United States."

The lower court said that the premises for the foregoing conclusions "are many and easily seen;" and then listed some of them as follows (App. B. p. 17a).

> 1. The span between the doing of the damage and the application of the claimed assuagement is too vague.
>
> 2. The time is too long.
>
> 3. The identity of the alleged tort feasors is too indefinite.
>
> 4. The procedure sought—adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power—is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

And finally, the Court of Appeals remarked:

> "* * * The whole concept is too uncertain of legal validity to sustain the self-establishment of the proceedings by a court in the absence of specific legislative or executive formulation."[5] (App. B. p. 17a).

CONCLUSION

The petition should be denied.

Respectfully submitted,

JOHN J. WILSON
FRANK H. STRICKLER
815 15th Street, N. W.
Washington, D. C. 20005
Attorneys for Respondent, Societe Internationale, etc.

October 1966

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[5] For the sake of brevity, one may single out the shortest remark of the lower court as completely decisive of Petitioners' alleged cause of action—"The time is too long." Section 12-301 (formerly Section 12-201), D.C. Code, 1961 Edition, Supplement V, prescribes a 3-year limitation for the bringing of an action against tort feasors. There is no applicable tolling provision. Only Congress, not the courts, could change this.

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 640-65

Complaint

Plaintiffs for their Complaint against the Defendants herein allege as follows:

I.

Plaintiffs are citizens of the Commonwealth of Pennsylvania; Defendant Interhandel is a foreign corporation organized under the laws of Switzerland; Defendants Nicholas Katzenbach and Douglas Dillon are officials of the United States Government and are citizens of the State of New Jersey.

The amount of the controversy exclusive of interest and costs exceeds $25,000.

II.

The Plaintiffs are Citizens of the United States who suffered loss and damage at the hands of the Nazi Conspiracy and who were not Citizens of the United States at the time they suffered such loss and damage, and Plaintiffs bring this Action on behalf of themselves and on behalf of each and all other persons who are similarly situated in that they are Citizens of the United States who suffered loss and damage at the hands of the Nazi Conspiracy and who were not Citizens of the United States when they suffered such loss and damage; such persons are so numerous as to make it impracticable to bring them all before this Court and the object of the Action is the adjudication of claims which do or may affect specific property involved in the Action, and there is a common question of law and fact affecting the several rights and a common relief is sought.

III.

The Defendants Nicholas Katzenbach, Attorney General of the United States as successor to the Alien Property Custodian, and Douglas Dillon, Secretary of the Treasury of the United States, have in their possession property in the amount of $123,000,000 which they state they hold for the Defendant Interhandel, said property being a portion of the proceeds of the sale of the stock of General Aniline Corporation which portion under the terms of the settlement of certain litigation, the Defendant Nicholas Katzenbach has stated he intends to pay to Defendant Interhandel.

IV.

The Plaintiffs herein were not parties to the litigation which has been settled by and between the Defendants herein, were not represented in such litigation, and have not released or settled their claims herein, and have not authorized anyone to release or settle their claims herein.

V.

The Defendant Douglas Dillon, Secretary of the Treasury of the United States of America, will receive said sum of $123,000,000 from the selling syndicate of Blythe and Company and First Boston and intends to pay said funds to the Defendant Interhandel.

VI.

Between January 30, 1933 and May 1, 1945 a number of men and of corporations in Europe, and particularly in Germany, acted in a gigantic conspiracy in the course of which they seized control of the territory of much of Europe, they illegally and wrongfully seized and appropriated the property and money and assets of the Plaintiffs herein, individually and of the class which they represent. They enforced the slave labor without compensation of the Plaintiffs herein and of the class which they represent. They killed illegally the members of the fam-

ilies of the Plaintiffs herein and of many of the class which they represent, from which deceased members of the families the Plaintiffs herein would have received economic support and would have been entitled to receive economic support. This gigantic conspiracy shall be hereinafter referred to in this pleading as the "Nazi Conspiracy".

VII.

I. G. Farbenindustrie, A.G., a corporation organized in Germany, of immense proportions, was an integral part of the Nazi Conspiracy, profited from the Nazi Conspiracy, participated in the Nazi Conspiracy, was enriched by the Nazi Conspiracy, and by the slave labor of the Plaintiffs, in the illegal seizure of properties and assets of the Plaintiffs herein. I. G. Farbenindustrie, A.G. has been adjudicated to have been an integral part of the Nazi Conspiracy in the Nuremberg Trials, and the Government of the United States has concluded officially that I. G. Farbenindustrie, A.G. was an integral part of the Nazi Conspiracy.

VIII.

The Defendant Interhandel herein was a creature of I. G. Farbenindustrie, A.G. The Defendant Interhandel was organized by I. G. Farbenindustrie A.G. and by its officers and principals as a Swiss holding corporation. The Defendant Interhandel has never legally established any other status than that of its organization as a creature of I. G. Farbenindustrie A.G. and as a matter of law and equity it must be presumed that its status is unchanged and that its status is unchanged for the purposes of this Action.

IX.

Defendant Societe Internationale pour des Participations Industrielles et Commerciales, S.A., a corporation organized under the laws of Switzerland, also known as

Interhandel A.G., and formerly known as I. G. Chemie, A.G., herein referred to as "Interhandel", is and should be fully accountable and liable to the extent of the assets and properties within the jurisdiction of this Court in the United States as herein set forth, and to the extent of the losses and damages of the Plaintiffs herein at the hands of the Nazi Conspiracy.

X.

Under the valid laws of the states in which the properties and assets of the Plaintiffs herein individually and as a class were seized and appropriated by the Nazi Conspiracy, this seizure and appropriation was wrongful and illegal and a cause of action and claim by the Plaintiffs herein exists by reason thereof. Under the valid laws in the states in which the Plaintiffs herein individually and as a class were forced to work as slave labor without compensation by the Nazi Conspiracy, this forced labor was illegal and gave rise to a valid claim for compensation on the part of the Plaintiffs. Under the valid laws in effect in the states in which it occurred, the killing of the members of the families of the Plaintiffs herein on whom the Plaintiffs herein could have relied for economic support was a wrongful and illegal act and gave rise to a cause of action for wrongful death and for compensation for loss of economic support.

In each instance the respective valid laws in the states concerned were in effect notwithstanding in some instances efforts by the Nazi Conspiracy to suspend or change these laws by decrees which were in themselves invalid and void.

XI.

The claims of the Plaintiffs herein rest further upon the inherent natural law which applies to the human rights and property rights of all human beings and which were violated by the Nazi Conspiracy.

XII.

The Government of the United States has officially declared and determined that the Defendant Interhandel is and was at all relevant times herein a creature of I. G. Farbenindustrie, A.G., and no determination to the contrary has been made by any Court.

XIII.

The class which Plaintiffs represent exceeds two hundred thousand persons and the loss and damage suffered by the Plaintiffs individually and as a class at the hands of the Nazi Conspiracy exceeds $123,000,000.

XIV.

The Plaintiffs individually and as a class in law and in equity have the right to the funds of $123,000,000 referred to in Paragraph III herein. Said assets are in the District of Columbia, and the Defendants Nicholas Katzenbach and Douglas Dillon are residents of the District of Columbia.

XV.

This Court has the jurisdiction to order said funds held by the Defendants Douglas Dillon, Secretary of the Treasury of the United States and Nicholas Katzenbach, Attorney General successor to the Alien Property Custodian; and this Court has the jurisdiction to appoint a master or masters to receive proof of claim and of loss under specified conditions and within specified limits of time, from the Plaintiffs individually within the class herein, and to direct the payment of said funds pro rata equitably to the Plaintiffs upon such proof of claim duly adjudicated, and the Plaintiffs plead that this be done.

XVI.

The loss and damage at the hands of the Nazi Conspiracy suffered by Plaintiff Wally Kelberine individually

includes the seizure and appropriation of a millinery store and a factory, the killing of her husband, incarceration in concentration camps at Dachau and Buchenwald, and the seizure and appropriation of moneys and other properties.

XVII.

The loss and damage at the hands of the Nazi Conspiracy suffered by Plaintiff Lenka Berlin includes the seizure and appropriation of properties, the enforced slave labor, the killing of her brothers, and other injuries and loss.

XVIII.

Each of the numerous members of the class which Plaintiffs represent have suffered similar loss and damage.

XIX.

Plaintiffs have no adequate remedy other than through the jurisdiction of this Court.

WHEREFORE, Plaintiffs pray judgment of this Court:

1. That the Defendants Douglas Dillon, Secretary of the Treasury of the United States of America, and Nicholas Katzenbach, Attorney General of the United States of America successor to the Alien Property Custodian, be permanently enjoined from paying the sum of $123,000,000 or any part thereof, received from the sale of the stock of General Aniline Corporation to the Defendant Interhandel and be directed to hold the said funds of $123,000,000 which are the portion of the proceeds of the sale of the stock of General Aniline, responsive to the further orders of this Court.

2. That the Plaintiffs as a class be adjudicated as having the right to said $123,000,000 in funds and to judgment to the extent of said funds against the Defendant Interhandel.

3. That upon the individual proof of claim by the Plaintiffs to a master or masters appointed by this Court, the Plaintiffs individually pro rata and equitably be paid said funds upon their adjudicated claims.

4. And for such other and further relief as this Court may deem just and equitable.

JOHN A. CROGHAN, ESQ.

Of Counsel:

HAROLD E. STASSEN
ALVIN DIAMOND
CHARLES E. FREEMAN
A. EVANS KEPHART
ROGER A. JOHNSEN
STASSEN, KEPHART, SARKIS & SCULLIN

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss.:

WALLY KELBERINE, being first duly sworn, deposes and says that she is one of the plaintiffs in the above-entitled action, that the allegations in the foregoing Complaint are true and as to those matters therein stated on information and belief she believes them to be true.

WALLY KELBERINE

Sworn to and Subscribed Before me this 16th Day of March, 1965.

s/ CORRINE L. BRESCIA
Notary Public

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19286

WALLY KELBERINE, ET AL., *Appellants*

v.

SOCIETE INTERNATIONALE, ETC., INTERHANDEL, ETC., ET AL., *Appellees*

Appeal from the United States District Court
for the District of Columbia

Decided April 7, 1966

Mr. Harold E. Stassen, of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of court, with whom *Mr. John Alvin Croghan* was on the brief, for appellants.

Mr. John J. Wilson, with whom *Mr. Frank H. Strickler* was on the brief, for appellee Societe Internationale, Etc.

Mr. Richard S. Salzman, Attorney, Department of Justice, with whom *Mr. David C. Acheson,* United States Attorney at the time the brief was filed, and *Mr. Morton Hollander,* Attorney, Department of Justice, were on the brief, for appellees Katzenbach and Fowler, *Mr. Fred W. Drogula,* Attorney, Department of Justice, also entered an appearance for appellees Katzenbach and Fowler.

Before PRETTYMAN and WILBUR K. MILLER, *Senior Circuit Judges,* and DANAHER, *Circuit Judge.*

PRETTYMAN, *Senior Circuit Judge:* This law suit has an antecedent history. In years prior to World War II the appellee Societe Internationale, Etc.,[1] a Swiss holding

[1] Known to this litigation variously as I. G. Chemie and as Interhandel.

corporation, came into ownership of various American properties, including over 90 per cent of the stock of General Aniline and Film Corporation, a Delaware corporation. In 1942 this stock was vested in the Alien Property Custodian, succeeded by the Attorney General of the United States, under the Trading with the Enemy Act.[2] When the war was over, Interhandel in 1948 sued under Section 9(a) of the Act to recover the property. The litigation was extensive.[3] Finally, in 1963 the case was settled by an agreement written and filed in the suit.[4] Pursuant to that stipulation the General Aniline stock was sold at public auction, some three hundred twenty-nine million dollars being realized from the sale. The bids were opened March 9, 1965, and the shares delivered March 17, 1965. Interhandel's share of the proceeds was one hundred twenty million dollars. This share was deposited in a special account in the Treasury and is being held there, delivery to Interhandel having been delayed by the terms of the settlement and by this law suit.

Our appellants, Wally Kelberine and Lenka Berlin, two individuals, filed this civil action on March 16, 1965, the day before the delivery of the Aniline stock pursuant to the sale at auction. In their complaint they say they suffered under the Nazi conspiracy in Europe and that they are now, although they were not at the time of their loss and damage, citizens of the United States. They say they bring the action on behalf of all persons similarly situated, too numerous to bring before the court. They

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[2] 40 STAT. 411 (1917), as amended, 50 U.S.C. App. § 1, *et seq.*

[3] See Societe Internationale v. Rogers, 357 U.S. 197 (1958), *reversing* Societe Internationale, Etc. v. Brownell, 100 U.S. App. D.C. 148, 243 F. 2d 254 (1957); Societe Internationale, Etc. v. McGranery, 111 F. Supp. 435 (D.D.C. 1953), *aff'd sub nom.* Societe Internationale, Etc. v. Brownell, 96 U.S. App. D.C. 232, 225 F. 2d 532 (1955), *cert. denied*, 350 U.S. 937 (1956).

[4] Civil No. 4360 (D.D.C. 1948).

say the Attorney General and the Secretary of the Treasury intend to deliver to Interhandel the $120,000,000 proceeds from the sale. They further say that between 1933 and 1945 a number of men and corporations in Europe acted in a gigantic conspiracy (referred to as the "Nazi Conspiracy") in the course of which they illegally seized the property of plaintiffs and of the class they represent, and that they (meaning the conspirators) enforced slave labor upon plaintiffs and killed members of the families of plaintiffs. They further alleged that I. G. Farbenindustrie, a corporation, was an integral part of the Nazi conspiracy, participated in it, and profited from it, and has been declared officially by the United States Government to have been an integral part of that conspiracy. They say that Interhandel was a creature of Farbenindustrie and that it is and should be fully accountable and liable to the extent of the assets within the United States and to the extent of the losses and damages of the plaintiffs at the hands of the Nazi conspiracy. Plaintiffs say that the seizures, etc., were illegal under the valid laws of the states concerned and that the claims of plaintiffs rest further upon inherent natural law. They say the class they represent exceeds two hundred thousand persons.

Plaintiffs pray that the Attorney General and the Secretary be enjoined from paying to Interhandel any part of the $120,000,000, that plaintiffs as a class be adjudicated as having "the right to said $123,000,000 in funds", and "That upon the individual proof of claim by the Plaintiffs to a master or masters appointed by this Court, the Plaintiffs individually pro rata and equitably be paid said funds upon their adjudicated claims."

The Government defendants moved to dismiss on the grounds that, as to them, the court lacked jurisdiction and that the complaint failed to state a claim upon which relief could be granted. Defendant Interhandel moved to dismiss "and/or" to quash the summons on the grounds

that it was not subject to process in the District and that it had not been properly served. Plaintiffs proceeded to take depositions in pursuit of discovery. The motions were set for hearing April 9, 1965. Plaintiffs moved to continue them generally. The court granted the Government defendants' motion to dismiss and continued Interhandel's motion, setting it for hearing on April 29th. Plaintiffs took further depositions and moved to continue the hearing on the motion to a still later date to permit them to explore further certain phases of discovery. The court denied the motion to continue and granted Interhandel's motion to dismiss and to quash service of process. This appeal followed.

I

Did the District Court err in refusing to continue consideration of the motions to dismiss pending the further taking of depositions by plaintiffs? The subject of the depositions, so far as is indicated, was the doing of business by Interhandel in the District of Columbia. Plaintiffs had one continuance of twenty days and had taken several depositions directed to this subject. Interhandel claimed the subject had been covered exhaustively. The court sought a proffer from counsel for plaintiffs, pointing out that plaintiffs said the only business of Interhandel was fronting for Farben and owning the stock of General Aniline. Upon that basis the court thought the evidence already taken was enough. Plaintiffs said that by taking the further depositions they would have "a more comprehensive and complete view". We think the court was correct, and in any event the matter was primarily in its discretion.

II

Did the court err when it quashed the service? We think it did. The District of Columbia statute[5] provides that

[5] D.C. Code § 11-306 (1961 ed.).

the District Court here shall have cognizance "of all cases in law and equity between parties, both or either of which shall be resident or be found within said district". Interhandel came into the District to file a civil action concerning its property. It continued to prosecute that action. It appointed and maintained here an attorney in fact, who was authorized to accept service of all notices and process on its behalf for such proceedings between it and the Attorney General and "Treasurer of the United States" as may be necessary to the enforcement of the stipulation of settlement of the pending civil action and of any judgment entered in that action; and for no other purpose whatever. We think the institution and prosecution of a civil action in the court here clearly establishes the presence of the corporation here. It voluntarily subjected itself to the jurisdiction of the court; it could not do so *in absentia*. So we think Interhandel was clearly found here.[6]

Interhandel says appellants' contentions on this point fail because it has never transacted business here. It says Congress defined "doing business" when it exempted from license requirements corporations which merely prosecute litigation.[7] The statute does not read as Interhandel reads it. It exempts these corporations from the necessity of getting a license, but it notably does not say they are not doing business. Furthermore the liability of a foreign corporation to suit here does not depend upon its doing business here; it depends upon its being found here.

The corporation being found here and therefore subject to suit here, the next question concerns service of process: Upon whom could service be had? We think service upon

[6] The "found" feature of this statute was discussed briefly by the Supreme Court in Graham v. Brotherhood of Firemen, 338 U.S. 232, 236 (1949).

[7] D.C. Code § 29-933(b) (1961 ed.)

the agent resident in the District was valid. His expressed authority was limited, to be sure. But it covered the law suit respecting the Interhandel property; he was empowered to accept service "for such proceedings between the parties to this Stipulation as may be necessary to the interpretation or enforcement, or both, of this Stipulation". The case at bar certainly involved the enforcement of the stipulation; indeed it sought to prevent that enforcement. It is true that proceeding was not between the parties to the stipulation, but all of those parties were parties to this suit. It could quite properly be held that process in this case fell within the agent's express authority. But we do not rest upon that power of attorney. We think that under the total circumstances of the case the agent of the corporation present in the District for the purpose of conducting the litigation in the courts here was subject to process in this suit. The statute says [8] that service may be made on a non-resident corporation by service thereof on "the registered agent", but it also provides [9] that nothing therein shall limit the right to serve process "in any other manner now or hereafter permitted by law." We are of opinion that, a foreign corporation being present in the District, its agent duly authority to do the tasks for which it is present here may be served with process in its behalf in an action reasonably within the ambit of those tasks.[10]

We intend this ruling to be no broader than the case. We hold that, if a foreign corporation comes into the District of Columbia for the purpose of filing and prose-

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[8] D.C. CODE § 29-933i(a) (1961 ed.).

[9] *Id.*, § 29-933i(c).

[10] See the discussions by the Supreme Court in Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Perkins v. Benguet Mining Co., 342 U.S. 437 (1952); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

cuting in the District Court a suit concerning certain property, it cannot, by restricting the authority of its resident agent, immunize itself against suit in that same court involving that same property.

It is suggested that since, as appears in a moment, we affirm the dismissal of the complaint, the dispute concerning the service of process is moot and ought not to be decided. But on the other hand, if Interhandel was not susceptible to process in the District, the nature of the complaint, valid *vel non*, was immaterial. Thus we think decision upon the service-of-process point is an integral first step in the resolution of the controversy. Had we decided Interhandel was not subject to suit, there would have been an end to the matter. But, since we hold Interhandel to have been subject to suit and correctly served, we pass on to the problem of the dismissal of the complaint.

III

Did the court err in dismissing the action against the Government officers? We think it did not.

Pending in the court here was a civil action by Interhandel against the Attorney General concerning properties vested in him by virtue of a federal statute. The President, by a memorandum dated January 8, 1963, and under authority vested in him by statute,[11] determined that the interest of the United States required the sale of this property. The Attorney General had power to settle the litigation.[12] He settled it. One of the terms

[11] Pub. L. No. 87-846, § 203, 76 STAT. 1113 (1962).

[12] Halbach v. Bumsted, 207 F. 2d 503 (3d Cir. 1953), *cert. denied sub nom.* Bumsted v. Markham, 347 U.S. 933 (1954); Standard Oil Co. v. Clark, 163 F. 2d 917 (2d Cir. 1947), *cert. denied*, 333 U.S. 873 (1948); Castell v. United States, 98 F. 2d 88 (2d Cir.), *cert denied*, 305 U.S. 652 (1938).

of the stipulation of settlement was that the funds would be held by the United States as security for the performance by Interhandel of certain indemnity obligations imposed upon it by the agreement. (Sec. VIII(4).) Those obligations (Sec. IX(2)) were that Interhandel would hold harmless the United States and its officers and employees from any claim made relating to actions described in certain paragraphs of the stipulation, or resulting from compliance by any officer of the United States with the stipulation, and from any claim made relating to the control or operation of the General Aniline and Film Corporation by Interhandel, or any of its stockholders, or persons under its control, or successors to such persons. Further, Interhandel agreed (Sec. IX(2)) to indemnify the United States and its officers and employees from any claims brought by the Government of the Netherlands on behalf of itself or its political subdivisions, Interhandel or persons under its control, or any Dutch national person, in respect to the properties subject to the stipulation. The stipulation provided that the United States could recover sums due by reason of the indemnities either by payment or by cancellation of the securities in which the properties were invested. And it provided (Sec. VIII(4)) that redemptions of these properties for Interhandel could be made from time to time as the Attorney General determines that such securities are no longer needed to secure the performance by Interhandel of its indemnity obligations. Thus it is amply clear that the United States has an interest in these securities and that its officers are performing official duties involving judgment and discretion, not mere ministerial chores. The action was to require these officers to turn over to plaintiffs these securities and also to prevent them from carrying out the obligations of the stipulation of settlement. Thus the action is against the United States, which has not consented to it. It was correctly dismissed.

Plaintiffs cite and rely upon *Mellon* v. *Orinoco Iron Co.*[13] and *Houston* v. *Ormes.*[14] None of the criteria listed in those cases as premises for exceptions to the general rule respecting unconsented-to suits against the United States are present in the case at bar.[15]

Moreover, (although the point is immaterial in view of the foregoing) plaintiffs specifically and expressly asserted to the trial court that they claim no equitable lien upon the funds being held in the Interhandel account. Thus they are in a position of persons merely interested in the common good and, under the doctrine of *Massachusetts* v. *Mellon,*[16] have no standing to sue.

IV

Did the court err when it dismissed the complaint? We think it did not.

The thesis of the action is easily recognized from the outline we have given of the complaint. Interhandel is a creature of Farben. Farben was a part of the Nazi conspiracy of 1933-45. The Nazi conspiracy, in violation of the laws of the several states involved and of natural law, damaged these two plaintiffs and others, to a number of some two hundred thousand, destroying their property, killing their relatives, and reducing them to slave labor. Therefore all the property of Interhandel should be awarded by American courts to these plaintiffs, pro rata. We are of opinion the thesis is not presently susceptible of judicial implementation. It may be that the Congress might enact a program and a procedure by which the objectives prayed

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[13] 266 U.S. 113 (1924).

[14] 252 U.S. 469 (1920).

[15] And see Smith v. Harrah, 60 App. D.C. 258, 51 F. 2d 314 (1931), and McCormack v. Harrah (a companion case), 60 App. D.C. 260, 51 F. 2d 316 (1931).

[16] 262 U.S. 447 (1923).

for could be achieved. But we think the courts alone cannot do it. As presently framed, the problem is not within the established scope of judicial authority. It did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United States. The premises for these conclusions are many and easily seen. The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tort feasors is too indefinite. The procedure sought—adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power—is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

The complaint prays, as we have noted, that all the Interhandel funds be divided "pro rata and equitably" among the participating petitioners. If only the present two participate, they would receive sixty million dollars apiece. If the entire potential two hundred thousand damaged persons entered the proceeding, each would receive six hundred dollars. This method of award would be a novelty to us. The events, the witnesses, the guilty tort feasors, their membership in the conspiracy are all so potentially vague at this point as to pose an insoluble problem if undertaken by the courts without legislative or executive guidance, authorization or support. The whole concept is too uncertain of legal validity to sustain the self-establishment of the proceedings by a court in the absence of specific legislative or executive formulation. It seems to us that the trial court correctly dismissed the action for failure to state a claim upon which relief can be granted.

Affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 539

SOCIETE INTERNATIONALE, ETC., (INTERHANDEL),
PETITIONER

v.

WALLY KELBERINE AND LENKA BERLIN

No. 549.

WALLY KELBERINE AND LENKA BERLIN, ET AL.,
PETITIONERS

v.

SOCIETE INTERNATIONALE, ETC. (INTERHANDEL),
RAMSEY CLARK, ACTING ATTORNEY GENERAL, AND
HENRY FOWLER, SECRETARY OF THE TREASURY

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE ACTING ATTORNEY GENERAL AND THE SECRETARY OF THE TREASURY IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 363 F. 2d 989.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1966, and a timely motion for rehearing was denied on June 16, 1966. The petition in No. 539 was filed on September 9, 1966; the petition in No. 549 was filed on September 13, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTE INVOLVED

Section 9(a) of the Trading with the Enemy Act, 50 U.S.C. App. 9(a) is set out in the Appendix, *infra*, pp. 13-16.

QUESTION PRESENTED

In 1963, Societe Internationale and the Attorney General settled the litigation between them relating to the ownership of certain shares of General Aniline & Film Corporation stock vested by the Alien Property Custodian in 1942. So far as the governmental respondents are concerned, the question presented is whether the suit brought by petitioners Kelberine and Berlin to enjoin the Attorney General and the Secretary of the Treasury from making payments to Societe Internationale in accordance with the terms of that settlement was properly dismissed as an unconsented suit against the United States.

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[1] "Pet. App." refers to the appendix to the petition in No. 549. "J.A." refers to the Joint Appendix in the court of appeals.

STATEMENT

1. *The nature of the action.* Petitioners Kelberine and Berlin[2] brought this action in March 1965, on behalf of themselves and all others "similarly situated," to recover the damages they allegedly suffered at the hands of the Nazi regime in Europe between 1933 and 1945, prior to their emigrating to the United States and becoming American citizens. The complaint alleged that petitioners were entitled to recover against the defendant Société Internationale—a Swiss holding company, commonly known as "Interhandel"— on the ground that Interhandel was the "creature" of I. G. Farbenindustrie, a German corporation, which was part of the "Nazi conspiracy" that was responsible for petitioners' injuries. Petitioners did not allege that either of them was directly injured by Interhandel or I. G. Farben.

Petitioners joined the Attorney General and the Secretary of the Treasury as co-defendants in an attempt to insure their recovery in the event they prevailed in the suit against Interhandel. They sought by this means to reach $120,000,000 then being held in the United States Treasury for Interhandel's account. Petitioners conceded that they did not claim

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[2] Cases No. 539 and 549 both seek review of the same decision of the court of appeals, which affirmed, as to all defendants, the dismissal of the complaint filed by petitioners in No. 549. Although Interhandel has also petitioned for certiorari (No. 539)—raising issues relevant only to the controversy between it and Mesdames Kelberine and Berlin—we shall, for convenience, refer to the latter as "petitioners" and to all other parties by name.

an equitable lien upon the fund in the Treasury but were merely potential judgment creditors against Interhandel (J.A. 100-101). The complaint asked that the governmental defendants be enjoined from paying any of that money to Interhandel pending the resolution of petitioners' lawsuit against the corporation; that the class which petitioners claimed to represent be awarded judgment of the entire $120,000,000; and that petitioners' individual claims be paid "pro rata" out of that sum.

2. *The fund in the Treasury.* The money in the Treasury account represented a portion of the proceeds realized from the public sale of certain shares of General Aniline & Film Corporation stock. The shares in question had been owned by Interhandel and were vested by the Alien Property Custodian in 1942 as enemy property under the Trading with the Enemy Act, 50 U.S.C. App. 1, *ff.* After the war, Interhandel brought suit under Section 9(a) of that Act for return of the vested shares. The extensive litigation which ensued [3] was finally ended in 1963 by a stipulation of settlement (J.A. 79-89) entered into between the Attorney General [4] and Interhandel and filed with the district court. *Societe Internationale* v. *Kennedy* (C.A. No. 4360-48, D.D.C.).

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[3] See, *Societe Internationale* v. *Rogers*, 357 U.S. 197, reversing *Societe Internationale* v. *Brownell*, 243 F.2d 254 (C.A. D.C.); *Societe Internationale* v. *McGranery*, 111 F. Supp. 435 (D.D.C.), affirmed *sub nom. Societe Internationale* v. *Brownell*, 225 F.2d 532 (C.A.D.C.), certiorari denied, 350 U.S. 937.

[4] By Executive Order No. 9788 of October 14, 1946, 11 Fed. Reg. 11981, the Attorney General succeeded to the powers and duties of the Alien Property Custodian.

Under the terms of the settlement, the vested General Aniline stock was sold to the public in March 1965. Some $329,000,000 was realized from the sale, of which approximately $120,000,000 represented Interhandel's share.[5] The settlement agreement, however, expressly subjected Interhandel's share to indemnity provisions in favor of the government (Secs. VIII and IX, J.A. 84-89). In particular, Interhandel agreed to "indemnify and hold harmless the United States, the Attorney General and all other officers, agents and employees of the United States from any and all claims, actions, or liabilities" which might arise from carrying out the terms of the settlement, from the operations of General Aniline & Film Corporation while under government control, and from the claims of certain other persons and the Netherlands Government relating to the ownership of the shares sold (Sec. IX(2), J.A. 86-87).

To insure Interhandel's performance of its indemnity agreement, the stipulation of settlement further provided that Interhandel was not to receive its portion of the proceeds of sale immediately. Rather, its

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[5] Pursuant to Section 39 of the Trading With the Enemy Act, 50 U.S.C. App. 39, the bulk of the government's share of the settlement proceeds were transferred to the War Claims Fund to be used in satisfying the claims of American citizens who suffered losses in World War II. Petitioners are ineligible for awards from that fund, which may only be made to persons who were American nationals at the time the loss or injury occurred. 50 U.S.C. App. 2017c. It should be noted, however, that petitioners have already received some compensation from German authorities (J.A. 51-52) and that other avenues of relief may be open to them elsewhere (J.A. 22-28).

share would be deposited in an account in its name in the Treasury and invested in U. S. Treasury obligations to "be held by the United States as security for the faithful performance by Interhandel of the indemnity obligations imposed upon it" (Sec. VIII(1), VIII(4), J.A. 84-85). If any liability were imposed which Interhandel was required to indemnify, the government had the right to cancel an appropriate amount of those Treasury obligations. Sec. IX(5), J.A. 89. The funds in the Treasury could be released to Interhandel only when and to the extent that "the Attorney General determines that such securities are no longer needed to secure the faithful performance by Interhandel of the indemnity obligations imposed upon it by * * * this Stipulation [of Settlement]" (Sec. VIII(4), J.A. 84-85).

3. *The proceedings below.* The district court dismissed petitioners' complaint against the governmental respondents as an uncontested suit against the United States (J.A. 102-103). It also dismissed the suit against Interhandel for want of *in personam* jurisdiction (J.A. 200). The court of appeals affirmed both dismissals. As to Interhandel, however, it held that there was *in personam* jurisdiction in the particular circumstances of this case, but that the complaint was properly dismissed for failure to state a claim upon which relief could be granted.

Petitioners' applications for "a stay pending appeal"—*i.e.*, an injunction against the payment of any money to Interhandel *pendente lite*—were denied by the district court on April 9, 1965, by the District of Columbia Circuit on April 12, 1965, by both the Chief

Justice and Mr. Justice Harlan on April 14, 1965, and by the court of appeals again on May 6, 1965.[6]

ARGUMENT

The decision below, affirming the district court's dismissal of the complaint against the Attorney General and Secretary of the Treasury, is clearly correct. There is no conflict or other occasion for review by this Court.

1. It is well settled that, in the absence of an express waiver of sovereign immunity, no court may entertain a suit against the United States.[7] An action nominally against government officials is, in reality, a suit against the United States "if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' *Land* v. *Dollar*, 330 U.S. 731, 738, * * * or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.' *Larson* v. *Domestic & Foreign Corp.*, [337 U.S. 682] at 704 * * *." *Dugan* v. *Rank*, 372 U.S. 609, 620. Petitioners' admitted purpose in naming the government officers as defendants in the present case was to reach

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[6] Following those denials, partial payment of Interhandel's share of the proceeds of the sale of the G.A.F. stock was made to that corporation in accordance with the stipulation of settlement. Approximately $31,000,000 is retained on deposit in the Interhandel account in the Treasury pursuant to the terms of the settlement agreement.

[7] *Mine Safety Co.* v. *Forrestal*, 326 U.S. 371; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643; *Dugan* v. *Rank*, 372 U.S. 609; *Hawaii* v. *Gordon*, 373 U.S. 57.

a large sum of money presently in the United States Treasury and to prevent the two cabinet officers from carrying out the terms of an agreement settling a major lawsuit against the government. Thus, as the court of appeals correctly ruled, "the action is against the United States, which has not consented to it" (Pet. App. 9a).

Petitioners appear to base their right to maintain this suit on the theory that this is an action against government officials who have exceeded their statutory authority. See *Dugan* v. *Rank*, *supra*, 372 U.S. at 621-622. Specifically, they assert that the Attorney General lacked authority to settle the suit brought by Interhandel to regain its vested assets. This contention is patently without merit. The courts have uniformly upheld the Attorney General's right to compromise litigation under Section 9 when he deemed it to be in the best interest of the United States to do so. *Halbach* v. *Markham*, 106 F. Supp. 475 (D. N.J.), affirmed *sub nom. Halbach* v. *Bumsted*, 207 F.2d 503 (C.A. 3), certiorari denied, 347 U.S. 933; *Standard Oil Co.* v. *Markham*, 64 F. Supp. 656, 666-667 (S.D.N.Y.), modified on other points *sub nom. Standard Oil Co.* v. *Clark*, 163 F.2d 917 (C.A. 2), certiorari denied, 333 U.S. 873; *Castell* v. *United States*, 98 F.2d 88 (C.A. 2), certiorari denied, 305 U.S. 652.

Contrary to petitioners' assertion (Pet. 7), the 1962 amendment to Section 9(a)[8] did not limit the Attorney General's authority to settle Interhandel's

[8] Act of October 22, 1962, 76 Stat. 1113, 50 U.S.C. App. 9(a).

lawsuit. Prior to 1962, Section 9(a) prohibited the sale of vested property in litigation, without the parties' consent, until the suit was ended. The sole purpose of the 1962 amendment was to permit the sale of such property, without consent, where "the interest and welfare of the United States require the sale." As the legislative history makes clear, the amendment was intended to increase, not to circumscribe, the Attorney General's discretion in alien property matters. In fact, that Act was specifically designed to permit the sale of the General Aniline shares involved here. See H. Conf. Rep. No. 2513, 87th Cong., 2d Sess., 2 U.S. Code Cong. & Admin. News 3841, 3842 (1962).

Petitioners rely solely on the provision in the 1962 amendment that the proceeds of sales *pendente lite* authorized by that amendment are to be "held in trust by the Secretary of the Treasury pending the entry of final judgment in any such suit." This provision does not divest the Attorney General of the authority to settle. Before the amendment, Section 9 (a) similarly required vested property to be retained in the Treasury or by the Custodian "until final judgment or decree" in suits under that Section. As we have noted (*supra*, p. 8), this language did not preclude the Attorney General from settling appropriate cases. Nothing in the 1962 amendment or its legislative history supports petitioners' contention that Congress wanted to put parties in Section 9 cases to the additional, expensive and useless formality of prolonging their litigation to final judgment when

all concerned had reached agreement settling their rights.[9]

In addition, as the court below also held, petitioners have no standing to challenge the settlement of Interhandel's suit against the Attorney General. Petitioners were not parties to that litigation and admittedly have no interest in the proceeds of settlement except as potential judgment creditors of Interhandel (Pet. 7). Indeed, had the Attorney General not settled the *Interhandel* litigation, the fund in question would not have been created. Petitioners are thus in the anomalous position of attacking the Attorney General's right to settle the case while attempting, at the same time, to retain the fruits of that settlement for themselves. In essence, their interest is simply that shared

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[9] Petitioners appear to have abandoned the alternate theory urged below that their right to maintain this suit is supported by *Mellon* v. *Orinoco Iron Co.*, 266 U.S. 121, and *Houston* v. *Ormes*, 252 U.S. 469. The court below properly held that the narrow criteria of those cases were not met here (Pet. App. 9a). Unlike the present case, those cases involved funds in which the government concededly had no interest and which were held by the Secretary of the Treasury solely for the ministerial act of payment to a specified third party, an act compellable by mandamus. In such circumstances, the Court held that a party claiming "an equitable right" in the fund could enjoin disbursement pending his suit against the payee, provided that the court had jurisdiction over the payee so that the decree would bind him and constitute a good acquittance to the United States. The Court was careful to note that its decision was confined to the narrow circumstances outlined above. See 252 U.S. at 473; see, also, *Smith* v. *Harrah*, 51 F. 2d 314 (C.A.D.C.); *McCormack* v. *Harrah*, 51 F. 2d 316 (C.A.D.C.); *Schmitz* v. *Societe Internationale*, 249 F. Supp. 757 (D.D.C.), affirmed on the opinion of the district court, Nov. 14, 1966, Nos. 19,995, 19,996, C.A.D.C.

with all other citizens in seeing that the Attorney General faithfully executes his duties under the law. That is not sufficient to give them standing to sue in federal court. *Massachusetts* v. *Mellon*, 262 U.S. 447; *Pauling* v. *McElroy*, 278 F. 2d 252 (C.A.D.C.), certiorari denied, 364 U.S. 835.

2. There is no substance to petitioners' contention (Pet. 10) that the district court's refusal to grant a further continuance for the taking of depositions constituted a denial of due process. The questions raised by petitioners—the Attorney General's authority to settle Interhandel's suit and the meaning of the 1962 amendment to Section 9(a)—were purely legal issues; they did not require extensive depositions for their proper resolution. The court of appeals correctly ruled that the district court did not abuse its discretion in this matter.

CONCLUSION

The petition for a writ of certiorari in No. 549 to review the judgment in favor of the Attorney General and the Secretary of the Treasury should be denied.[10]

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

BAREFOOT SANDERS,
Assistant Attorney General.

MORTON HOLLANDER,
RICHARD S. SALZMAN,
Attorneys.

NOVEMBER 1966.

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[10] In No. 539, Interhandel asks this court to review that portion of the decision below which held it present in the District of Columbia for purposes of *in personam* jurisdiction. Without taking any position as to the correctness of that ruling, which the court of appeals carefully limited to the somewhat unusual circumstances of this case (Pet. App. 7a), we point out that the judgment of the court of appeals was entirely in Interhandel's favor, having affirmed the dismissal of petitioners' suit against it. Thus, in the event the Court does not grant certiorari to petitioners in No. 549, the issues raised in No. 539 are academic as to the parties to the instant suit. In such circumstances, we suggest that the petition in No. 539 does not present an appropriate matter for review by this Court. Cf. *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206; Stern & Gressman, *Supreme Court Practice*, pp. 21-22 (3d ed., 1962).

APPENDIX

The pertinent portion of Section 9 of the Trading With the Enemy Act, 50 U.S.C. App. 9 provides:

> (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the

President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6, 7-39, and 41-44 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated: *Provided further*, That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this sub-

section and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net proceeds of the sale in an amount not to exceed the amount the claimant

would have received had he elected to accept his proportionate part of the net proceeds of the sale, and the balance, if any, shall be payable in the same manner as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed.

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No. 549

IN THE

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OCTOBER TERM, 1966

WALLY KELBERINE and LENKA BERLIN, ET AL.,
Petitioners,

v.

SOCIETE INTERNATIONALE, ETC. (INTERHANDEL), RAMSEY CLARK, ACTING ATTORNEY GENERAL, and HENRY FOWLER, SECRETARY OF THE TREASURY.

PETITION FOR A REHEARING UPON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

HAROLD E. STASSEN
ROGER A. JOHNSEN
1020 Fidelity-Philadelphia
Trust Building
Philadelphia, Pennsylvania
19109

ALVIN DIAMOND
JOHN A. CROGHAN
CHARLES B. E. FREEMAN
A. EVANS KEPHART
824 Federal Bar Bldg.
Washington, D.C.
Of Counsel

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 549

WALLY KELBERINE and LENKA BERLIN, ET AL.,
Petitioners,

v.

SOCIETE INTERNATIONALE, ETC., (INTERHANDEL), RAMSEY CLARK, ACTING ATTORNEY GENERAL, and HENRY FOWLER, SECRETARY OF THE TREASURY.

PETITION FOR A REHEARING UPON THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner prays for a Rehearing upon the Petition that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on April 7, 1966.

The Petition for a Writ of Certiorari was denied on December 12, 1966.

Petitioner prays for a Rehearing upon the grounds that Congress has consented to this suit by clear implication; the Brief for the Acting Attorney General and the Secretary

of the Treasury in Opposition was erroneous in a substantial and controlling factor in the reference to the legislative history of the 1962 amendment to the Statute in question; this erroneous statement of legislative history had a substantial and controlling effect in the opposition to the Petition for Writ of Certiorari; this statement as to legislative history was made for the first time in this entire proceedings in the Brief in Opposition; that petitioner acting diligently and promptly has now completed the necessary research to establish and present to this Court not only the erroneous nature of these statements as to legislative history; but also the fact that the correct statement of legislative history, not previously presented to the Court, constitutes within its details and their implications the basis of Congressional consent to the suit of the petitioner, and the removal of the sovereign immunity to suit herein.

ERRONEOUS STATEMENTS OF BRIEF IN OPPOSITION

At page 9, line 27, of the Brief in Opposition for the Acting Attorney General, it is stated:

> "Nothing in the 1962 amendment or its legislative history supports petitioners' contention that Congress wanted to put parties in Section 9 cases to the additional, expensive and useless formality of prolonging their litigation to final judgment when all concerned had reached agreement settling their rights."

Further on Page 9 and at Line 8 the Brief in Opposition states:

> "As the legislative history makes clear, the amendment was intended to increase, not to circumscribe, the Attorney General's discretion in alien property matters."

FIVE SPECIFIC INSTANCES OF LEGISLATIVE HISTORY

Contrary to the statements and the implications of the Brief in Opposition, there are the following five specific instances of the legislative history which supports the position of the Petitioners. Thorough research of the entire legislative history has found no legislative history to support the position of the Brief in Opposition. The legislative history sustains the consent of Congress to the suit herein as will be set out in detail below.

In the report of the Committee on Interstate and Foreign Commerce, which was the Committee which handled this legislation, there is presented, as an Appendix, a letter from the U. S. Department of Justice, Office of the Deputy Attorney General, under date of August 11, 1961 to the Chairman Oren Harris of the Committee on Interstate and Foreign Commerce.

At page 16 of this Appendix, line 16 we find this statement:

> "Further, upon the determination, the Office of Alien Property would be authorized to sell the property and deposit the proceeds of sale in a special account in the Treasury, *to be held in trust pending the entry of final judgment in the suit.*" (Emphasis supplied)

H.R. Rep. No. 2046, 87th Cong.
2d Sess. 16 (1962)

In this report of the Committee at page 2 under the entitlement "Explanation of Reported Bill", paragraph 2 is as follows:

> "The reported Bill would amend Section 9(a) to provide that upon a determination by the President, in time of war or national emergency, that the interest and welfare of the United States require the sale of

any property or interest claimed in any suit filed under this Subsection and pending on or after the date of enactment of this legislation the Alien Property Custodian or any successor, officer or agency may sell the same with the net proceeds of such sale being deposited in a special Treasury Account, *pending the entry of final judgment in the suit.*" (Emphasis supplied.)

Id. at page 2

On September 12, 1962 Senator Mansfield called up the Bill and Senator Keating took the floor to explain the Bill. Senator Keating stated on the floor of the Senate:

"The proceeds from the sale would be deposited in a special account in the Treasury to be held in trust *pending the entry of the final judgment in the suit.*" (Emphasis supplied.)

108 Cong. Rec. 19198 (1962)
(Third Column Third Paragraph)

On March 4, 1963, Senator Mansfield presented to the Senate a report of the settlement of the General Aniline and Film Corporation case and had printed in the Record the announcement of the Attorney General under date of March 13, 1963. In the third column in the fourth paragraph, it is stated:

"Mr. Kennedy said Interhandel stockholders are expected to vote on the proposed settlement this month. If they approve, the Government and Interhandel would enter into a consent judgment, *subject to the approval of the district court.*" (Emphasis supplied.)

109 Cong. Rec. 3332 (1963)
(Column Two)

In the ensuing discussion of this report on the floor of the Senate at Page 3333 of the Congressional Record of March 4, 1963, second column fourth paragraph of the

address of Senator Keating, the following statement is reported as made to the Senate on the floor:

> "Any settlement of this magnitude deserves close scrutiny to make certain that it is in the interests of the United States. In the first instance, this will be the task of the district court, *which will have to approve any consent judgment submitted by the parties.*" (Emphasis supplied.)
>
> *Id.* at page 3333

Thus it is quite clear that the Attorney General in submitting the proposed Bill originally to the Congress and in reporting to the Congress on the settlement, in both instances considered that the final judgment of the Court was an essential step in the process before the funds were to be paid to Interhandel. It is further clear that in both the Senate and the House this was the understanding as the legislative history makes clear.

Petitioner reemphasizes that a thorough and meticulous research has not revealed any statement of any nature which would sustain the erroneous impression given in the Brief in Opposition of the Acting Attorney General.

CONSENT OF CONGRESS TO SUIT FROM JUDICIAL RIGHT TO GRANT INTERVENTION

The importance of these erroneous statements is very clear. In any proceeding for final judgment, the District Court would have had the discretion to permit these petitioners herein, individually and as representatives of the class of victims of Interhandel and I. G. Farben, to intervene. This constitutes consent of Congress to the suit herein. The failure of the Attorney General and Secretary of the Treasury to follow this required procedure before payment, should not become a method of preventing the petitioners from the adjudication of their rights; it should

not deprive them of their property rights without due process; it should not be a technique for the officials concerned to step behind a screen of sovereign immunity when Congress made it clear that there should be no such sovereign immunity in this situation, and has consented to the judicial review and the essential judicial jurisdiction.

PAYMENT TO INTERHANDEL WITHOUT FINAL JUDGMENT NOT INTENDED BY CONGRESS

Under the decisions of this Court if the projected delivery of these funds to Interhandel by the Attorney General and the Secretary of the Treasury is an act which is beyond the legislative intent in that it is not preceded by final judgment of the Court in the suit involved, and if it was the legislative history that it was the intention of the Congress that the final judgment in the Court should precede the payment of any funds to Interhandel, then the Court does have jurisdiction in Petitioners' suit over this projected act of payment and can, since *in personam* jurisdiction has been established over Interhandel, redirect this final act of payment to the Petitioners, representative of the class of victims of Interhandel, in lieu of their payment to Interhandel.

Thus, the prayer for relief in this suit would not be within the category of an unconsented suit against the United States Government, but would be within the category of the proper judicial review of acts and projected acts of officials of the United States Government and within the category of consented suits.

Petitioner further reemphasizes that Petitioners' suit does not constitute an attack upon the settlement or the right to settle.

Petitioner's suit does not constitute any attempt to claim funds in any manner adverse to the United States Government.

CONGRESS CONSENTED TO COURT'S JURISDICTION OVER PAYMENT OF FUNDS

Petitioners' suit is directed specifically to the very important point of the Court's jurisdiction over the final act of payment to Interhandel, of that portion of the proceeds to which the United States lays no further claim. Congress consented to such judicial review. Petitioners' suit is further directed at such time that the United States has no further interest in retaining said funds for its part for any reason whatsoever. Petitioners pray for judgment directing that this payment shall not be made to Interhandel, since it has not been preceded by final judgment in the suit as required by both the language of the act and the clear legislative history, but shall be made in trust for the Petitioners as representatives of the class of citizens of the United States who were victims of the defendant Interhandel and who have not been in any manner compensated within the War Claims Act, as they were not citizens of the United States at the time of World War II.

CONGRESS REQUIRED COURT APPROVAL THROUGH JUDGMENT BEFORE PAYMENT

It is respectfully submitted that the legislative history makes it very clear that the Congress gave to the Attorney General the additional power of sale upon the determination by the President, but with the definite *requirement* that the distribution of the proceeds of such a sale shall be under the *final judgment of the Court.* This act of final payment is thus under the jurisdiction of the Court, *with the consent of Congress to such jurisdiction,* and the direction of the Congress that is required. This act of payment should not be held to be beyond judicial review. To do so would be an unsound extension of the terms of the sovereign immunity from suit doctrine. It would be contrary to the

systems of checks and balances of the United States Constitutional system. It would violate Petitioners' rights under the due process clause of the Constitution of the United States.

SUBSTANTIAL AND CONTROLLING GROUNDS NOT PRESENTED PREVIOUSLY

This is a substantial and controlling grounds. It has not been presented previously to this Court or to the Courts below. It came into view only through the correction of the erroneous statements in the Brief in Opposition, statements which had not been made before.

Petitioners therefore respectfully request a rehearing of their Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit in Wally Kelberine and Lenka Berlin, *et al* vs. Interhandel and the Acting Attorney General and the Secretary of the Treasury.

Respectfully submitted,

HAROLD E. STASSEN

ROGER A. JOHNSEN
1020 Fidelity-Philadelphia
Trust Building
Philadelphia, Pennsylvania
19109

ALVIN DIAMOND
JOHN A. CROGHAN
CHARLES B. E. FREEMAN
A. EVANS KEPHART
824 Federal Bar Bldg.
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Of Counsel

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CERTIFICATE OF COUNSEL IN COMPLIANCE WITH RULE

We hereby certify that the foregoing *Petition for Rehearing* is presented in good faith and not for delay, and is restricted to the grounds specified in Paragraph 2 of Rule 58.

HAROLD E. STASSEN

ROGER A. JOHNSEN

January, 1967